

**10436 Request for Review of Order Granting Dismissal**

Where a motion to dismiss the entire complaint is granted by the Administrative Law Judge, any appeal should be in the form of a request for review filed with the Board within 28 days of the order of dismissal. Sec. 102.27, Rules and Regulations and Sec. 10388.2.

**10438 Exceptions; Cross-Exceptions; Brief Supporting the Administrative Law Judge's Decision and Request for Oral Argument**

Sec. 102.46, Rules and Regulations sets forth the time limits and format of exceptions, cross-exceptions and briefs in support, as well as any answering briefs and reply briefs. The time limits, format and strictures of Sec. 102.46 must be read with care and followed.

**10438.1 Filing of Exceptions; Cross-Exceptions**

Any party, including the General Counsel, may file written exceptions and a brief in support of those exceptions contending that a material part(s) of the Administrative Law Judge's decision and recommended order is erroneous and should not be adopted by the Board. Cross-exceptions may be filed in response to another party's exceptions by any party who has not previously filed exceptions; they are governed by the same rules and format applicable to exceptions. Sec. 102.46(e), Rules and Regulations. Eight copies of the exceptions or cross-exceptions and any brief in support must be filed with the Board, with copies served on all other parties. See also Sec. 11846.4 for electronic filing and service.

**10438.2 Time for Filing Exceptions and Cross-Exceptions**

Exceptions must be filed within 28 days of service of the order transferring the case to the Board, unless an extension of time is granted. Sec. 102.46(a), Rules and Regulations.

Cross-exceptions must be filed within 14 days from the last date on which exceptions and any supporting brief may be filed, unless an extension of time is granted. Sec. 102.46(e), Rules and Regulations.

Secs. 102.111–102.114, Rules and Regulations govern time computations and other service and filing requirements and must be strictly followed. Exceptions, cross-exceptions, briefs in support, and other briefs in this topic area are accepted as timely filed by the Board if they are “postmarked on the day before (or earlier than) the due date” or hand delivered to or electronically received by the Board on or before the closing time of the receiving office on the due date. See particularly Sec. 102.111(b).

**10438.3 Responsibility for Determination and Preparation of Exceptions; Cross-Exceptions**

Ordinarily, the Regional Office determines whether to file exceptions or cross-exceptions. However, where a complaint was authorized by the Office of the General Counsel, normally the Division of Advice or the Office of Appeals, the Regional Office

## 10438 EXCEPTIONS; CROSS-EXCEPTIONS; BRIEF SUPPORTING THE ADMINISTRATIVE LAW JUDGE'S DECISION AND REQUEST FOR ORAL ARGUMENT

should make a timely recommendation to the branch or division involved as to filing exceptions or cross-exceptions and whether the original theory or another should be pursued.

Generally, exceptions should be filed when there is a reasonable possibility of success and the matter involved is of sufficient importance to the overall case. The standard for cross-exceptions should be substantially similar. Credibility findings are often difficult to successfully overturn and should normally be attacked only when other factors besides "demeanor" are the basis of the resolution.

Exceptions to *favorable* Administrative Law Judge findings and conclusions should be filed only where there are obvious errors, the rationale of the ALJ needs bolstering or the recommended remedy is inappropriate or inadequate.

### 10438.4 Preparation of Exceptions; Cross-Exceptions

Sec. 102.46(b), Rules and Regulations sets forth the format and requirements of each exception filed and Sec. 102.46(c) addresses the format and substance of the brief in support. The format and requirements for cross-exceptions and any brief in support thereof are governed by the same considerations applicable to exceptions. Sec. 102.46(e), Rules and Regulations. These documents frame the issues presented to the Board for its consideration. The supporting brief, if filed, contains the argument and citation of authority and the exceptions shall not contain such argument and citations, unless no supporting brief is filed. Together, both documents should, at a minimum, make clear:

- Specifically, the questions of procedure, fact, law or policy to which exception is taken
- Where in the Administrative Law Judge's decision each excepted to item is found or discussed
- What transcript pages and/or exhibits support the argument being made
- Where a disputed ruling may be found in the Administrative Law Judge's decision or the transcript and
- The reasons and citations of authority the party asserts to support its position

Broad general exceptions, which do not clearly identify the issues, are not acceptable. See *Howe K. Sipes Co.*, 319 NLRB 30 (1995). For example, an exception claiming the ALJ failed to find a violation of Section 8(a)(1) or 8(b)(1)(A), without more, is insufficient. On the other hand, such an exception is sufficient if it identifies a specific complaint allegation the ALJ found without merit, or did not address, and, in tandem with the brief in support, contains the specificity described above. If no brief is filed, the supporting argument must be included in the exceptions.